

**DRAFT: May 5, 1995**

## **AGREEMENT AND PLAN OF REORGANIZATION**

THIS AGREEMENT AND PLAN OF REORGANIZATION (the "Agreement") is entered into as of May \_\_\_, 1995, by and among America Online, Inc., a Delaware corporation ("AOL"), AOL Acquisition Corp., a California corporation and wholly-owned subsidiary of AOL ("Sub"), and Wide Area Information Servers, Inc., a California corporation ("WAIS").

### **RECITALS**

A. The parties intend that, subject to the terms and conditions hereinafter set forth, Sub will merge with and into WAIS in a statutory merger or consolidation (the "Merger"), with WAIS to be the surviving corporation, pursuant to the terms and conditions set forth herein, and pursuant to an Agreement of Merger substantially in the form of Exhibit A (the "Agreement of Merger") and the applicable provisions of the laws of the State of California. Upon the Merger, all outstanding capital stock of WAIS will be converted into Common Stock of AOL, in the manner and on the basis determined herein and as provided in the Agreement of Merger.

B. The Merger is intended to be treated as (i) a tax-free reorganization pursuant to the provisions of Section 368(a)(1)(A) of the Internal Revenue Code of 1986, as amended (the "Code"), by virtue of the provisions of Section 368 (a)(2)(E) of the Code and (ii) a "pooling of interests" for accounting purposes.

NOW, THEREFORE, the parties hereto hereby agree as follows:

### **1. PLAN OF REORGANIZATION**

1.1 The Merger. The Agreement of Merger will be filed with the Secretary of State of the State of California as soon as practicable after WAIS Shareholder approval is obtained as described in Section 4.4 hereof. The effective time of the Merger as specified in the Agreement of Merger (the "Effective Time") is expected to occur on May \_\_\_, 1995. Subject to the terms and conditions of this Agreement, Sub will be merged with and into WAIS in a statutory merger or consolidation pursuant to the Agreement of Merger and in accordance with applicable provisions of California law as follows:

1.1.1 Conversion of Shares. Unless there is an adjustment to the shares to be issued in the Merger pursuant to Section 1.1.4 below, each share of WAIS Common Stock ("WAIS Common Stock" or "WAIS Stock"), that is issued and outstanding immediately prior to the Effective Time and that does not dissent pursuant to Section 1.1.5 hereof, will, by virtue of the Merger and at the Effective Time, and without further action on the part of any holder thereof, be converted into such number of fully paid and nonassessable shares of AOL Common Stock, \$0.01 par value per share ("AOL Common Stock") as shall be determined under the following formulas:

the WAIS Financial Statements; (ii) discharged in accordance with the terms of any contractual obligations existing on the date hereof and disclosed to AOL on the WAIS Schedules; or (iii) incurred in the ordinary course of business after the Balance Sheet Date; or

(i) any obligation or material liability incurred by WAIS to any of its officers, directors or shareholders, or any loans or advances made to any of its officers, directors or shareholders except normal compensation, commissions, bonuses and expense allowances payable to officers consistent with past practice or consistent with WAIS contractual obligations elsewhere described in the WAIS Schedules.

Since December 31, 1994 February 28, 1995, WAIS has not entered into represented under any Government Contracts Contract (as defined in Section 2.22 hereof) that it will deliver WAIS products with restricted rights and, since such date, has submitted no invoice or other claim for payment for WAIS products in connection with any Government Contract.

2.11 Agreements and Commitments. Except as set forth in Section 2.11 to the WAIS Schedules or as listed in Section 2.12, Section 2.15.3 or Section 2.15.6, respectively, to the WAIS Schedules, as required by Section 2.12, Section 2.15.3 or Section 2.15.6, as the case may be, WAIS is not a party or subject to any oral or written executory agreement, obligation or commitment which is described below:

(a) (i) Contract, commitment, letter contract or purchase order providing for payments by WAIS in an amount of (1) \$35,000 or more in the ordinary course of business to any one vendor; or (2) \$20,000 or more not in the ordinary course of business to any one vendor; or (ii) quotation, bid or proposal providing for payments by WAIS in an amount of (1) \$35,000 or more in the ordinary course of business to any one vendor; or (2) \$20,000 or more not in the ordinary course of business;

(b) License agreement as licensor or licensee (except in cases where WAIS is a licensor or a licensee for standard (except for immaterial deviations) non-exclusive software licenses granted to end-user customers in the ordinary course of business, the forms of which have been provided or made available to AOL), but in all events including site licenses for products and each agreement that provides for either the delivery of source code to the licensee or escrow of such source code for the benefit of such licensee;

(c) Agreement by WAIS to encumber, transfer or sell rights in or with respect to any WAIS Intellectual Property (as defined in Section 2.12 hereof) (except in cases where WAIS is a licensor for standard (except for immaterial deviations) non-exclusive software licenses granted to end-user customers in the ordinary course of business, the forms of which have been provided or made available to AOL's counsel);

(d) Agreement for the sale or lease of real or tangible personal property involving more than \$25,000 per year;

(e) Written dealer, distributor, sales representative, original equipment manufacturer, value added remarketer or other agreement for the ongoing distribution of WAIS's products;

(n) issue or sell any shares of its capital stock of any class (except upon exercise of Current WAIS Options), or any other of its securities, or issue or create any warrants, obligations, subscriptions, options, convertible securities or other commitments to issue shares of capital stock, or accelerate the vesting of any outstanding option or other security except as may be required by the terms of such options or securities;

(o) split or combine the outstanding shares of its capital stock of any class or enter into any recapitalization affecting the number of outstanding shares of its capital stock of any class or affecting any other of its securities;

(p) merge, consolidate or reorganize with, or acquire any entity other than Sub;

(q) amend its Articles of Incorporation or Bylaws;

(r) agree to any audit assessment by any tax authority or file any federal or state income or franchise tax return unless copies of such returns have been delivered to AOL for its review prior to filing;

(s) license any of its technology or any WAIS Intellectual Property, except in the ordinary course of business consistent with past practice;

(t) enter into, amend or terminate any Government Contract that requires or by its express terms permits the delivery of WAIS products, or submit any invoice or other claim for payment in connection with any such Government Contract;

(u) change any insurance coverage;

(v) terminate the employment of any key employee listed in Section 2.15.2 of the WAIS Schedules; or

(w) agree to do any of the things described in the preceding clauses 4.3(a) through 4.3(v).

4.4 Shareholder Approval. Unless such shareholder approval is to be obtained by written consent, WAIS will promptly and duly call a special meeting of its shareholders to be held at least seven (7) business days prior to the Effective Time, to submit this Agreement, the Agreement of Merger and related matters for the consideration and approval of the WAIS shareholders, will obtain such approval at such meeting or by means of written consent by such date. Such WAIS shareholder approval will be obtained in compliance with applicable law.

4.5 Regulatory Approvals. WAIS will execute and file, or join in the execution and filing of, any application or other document that may be necessary in order to obtain the authorization, approval or consent of any governmental body, federal, state, local or foreign which may be reasonably required, or which AOL may reasonably request, in connection with the consummation of the transactions contemplated by this Agreement. WAIS will use its best efforts to obtain all such authorizations, approvals and consents.

outstanding as of March 17, 1995, (ii) holders of 99% of the WAIS Stock outstanding on the record date for obtaining shareholder approval of this Agreement and the Agreement of Merger, and (iii) as required by applicable law and WAIS's Articles of Incorporation and Bylaws. WAIS will comply with Chapter 13 of the California General Corporation Law with respect to any Dissenting Shares.

8.9 Pooling Opinion. AOL shall have received from Ernst & Young LLP, an opinion, in form and substance satisfactory to AOL, that the Merger will be treated as a "pooling of interests" for accounting purposes.

8.10 Escrow. AOL shall have received the Escrow Agreement executed by the parties thereto.

8.11 Continuity of Interest Representations. AOL shall have received the form of Continuity of Interest Certificate attached hereto as Exhibit 8.11, signed by WAIS Shareholders who will receive a majority of the AOL Common Stock in the Merger.

8.12 Noncompetition Agreements. AOL shall have received noncompetition and nonsolicitation agreements in the forms attached as Exhibit 8.12 (the "Noncompetition Agreements"), executed by Brewster Kahle, Bruce Gilliat and Harry Morris, which will become effective only upon the Closing of the Merger.

8.13 Registration Rights Agreement. AOL shall have received from each holder of WAIS Stock receiving AOL Common Stock in the Merger hereunder an executed copy of the Registration Rights Agreement.

8.14 Investment Representation Agreement. AOL shall have received from each holder of WAIS Stock receiving AOL Common Stock in the Merger hereunder an executed Investment Representation Agreement substantially in the form of Exhibit 8.14 hereto.

## **9. TERMINATION OF AGREEMENT**

### **9.1 Prior to Closing.**

9.1.1 This Agreement may be terminated at any time prior to the Closing by the mutual written consent of each of the parties hereto.

9.1.2 Unless otherwise specifically provided herein or agreed by the parties hereto, this Agreement will be terminated if all conditions to the Closing have not been or cannot reasonably be satisfied or waived on or before May 31, 1995 unless the Closing has been extended by the parties.

9.2 At the Closing. At the Closing, this Agreement may be terminated and abandoned:

9.2.1 By AOL if any of the conditions precedent to AOL's and Sub's obligations set forth in Section 8 above have not been fulfilled or waived at and as of the Closing; or

9.2.2 By WAIS if any of the conditions precedent to WAIS's obligations set forth in Section 7 above have not been fulfilled or waived at and as of the Closing.

Any termination of this Agreement under this Section 9.2 will (i) be effective upon the delivery of notice of the terminating party to the other party hereto, except as provided below and (ii) will not result in liability for either party to the other.

9.3 No-Shop Provision; Break Up Fee. WAIS agrees that, from the date hereof until the Closing Date or the earlier mutual abandonment (confirmation of such abandonment not to be unreasonably withheld) of the transactions contemplated by this Agreement (the "No-Shop Period"), WAIS and Mr. Brewster Kahle will not, and will not authorize any officer or director of WAIS or any other person on its behalf to, solicit, encourage, negotiate or accept any offer from any party concerning: (i) the possible disposition of all or any substantial portion of WAIS's business, assets or capital stock by merger, sale or any other means or any other transaction that would involve a change in control of WAIS; or (ii) the sale of any equity or debt securities of WAIS. WAIS will promptly notify AOL in writing of any such inquiries or proposals. If WAIS merges with, or WAIS or its assets are acquired by, a company other than AOL or a wholly-owned subsidiary of AOL during a period of one year after March 17, 1995 and if discussions with such company concerning such acquisition occur during the No-Shop Period, WAIS (or the acquiring company) will immediately pay AOL the sum of \$3,000,000 and AOL will make no other claims against WAIS or its shareholders regarding the transactions contemplated by this Agreement. WAIS shall have no obligations under this Section if AOL decides at its sole discretion not to proceed with the transactions contemplated by this Agreement or causes such transactions not to occur (other than as a result of WAIS's breach of this Agreement or intentional failure to cause a condition of Closing to occur).

9.4 Certain Continuing Obligations. Following any termination of this Agreement pursuant to this Section 9, the parties hereto will continue to perform their respective obligations under Section 9.3 and Section 11 but will not be required to continue to perform their other covenants under this Agreement.

## **10. SURVIVAL OF REPRESENTATIONS, INDEMNIFICATION AND REMEDIES**

10.1 Survival of Representations. All representations, warranties and covenants of WAIS contained in this Agreement will remain operative and in full force and effect, regardless of any investigation made by or on behalf of the parties to this Agreement, until the earlier of the termination of this Agreement in accordance with its terms or the Final Release Date (as defined in the Escrow Agreement), whereupon such representations, warranties and covenants will expire; provided that the representations and warranties contained in the following Sections, to the extent the same apply to conditions existing on or before the Closing Date, shall remain operative and in full force and effect until the first anniversary of the Closing Date: (i) Section 2.8 (Taxes), to the extent such representation and warranty may apply would be false if made to the knowledge of, ~~or to the intentional, knowing or willful action or inaction of~~, WAIS and/or Mr. Kahle; (ii) Section 2.12 (Intellectual Property), or if due to the extent such representation

and warranty may apply (A) to the knowledge of, or to the intentional, knowing or willful action or inaction of, ~~WAIS or Mr. Kahle, and/or (B) WAIS and/or Mr. Kahle that could reasonably be expected to result in imposition of a penalty with respect to taxes (as defined in Section 2.8 hereof); (ii) Section 2.12 (Intellectual Property), to the extent such representation and warranty would be false (A) if made to the knowledge of WAIS and/or Mr. Kahle, or if due to the willful infringement by WAIS or Mr. Kahle of any Intellectual Property Rights of any other person, and/or (B) if made with respect~~ to any claim or potential claim of Thinking Machines Corporation and/or its trustees or administrators, successors or assigns ("TMC Claims"); and (iii) Section 2.14 (Certain Transactions and Agreements), to the extent such representation and warranty ~~may apply~~ ~~would be false if made~~ to the knowledge of, or ~~if due~~ to the intentional, knowing ~~or and~~ willful action or inaction of, WAIS and/or Mr. Kahle (collectively, the "Specific Representations"). AOL's and Sub's representations, warranties and covenants contained in this Agreement shall terminate as of the earlier of the termination of this Agreement in accordance with its terms or the Final Release Date.

10.2 Indemnity and Escrow Agreement. Subject to the limitations set forth in this Section 10, the WAIS Shareholders will indemnify and hold harmless AOL, Sub and its respective officers, directors, agents and employees, and each person, if any, who controls or may control AOL or Sub within the meaning of the Securities Act (hereinafter referred to individually as an "Indemnified Person" and collectively as "Indemnified Persons") from and against any and all losses, costs, damages, liabilities and expenses arising from claims, demands, actions, causes of actions, including, without limitation, reasonable legal fees, net of any recoveries under applicable insurance policies, or indemnities from third parties or tax benefits to AOL resulting from such damage and known to AOL at the time of making a claim under the Escrow (hereinafter referred to as "Damages") arising out of (a) any misrepresentation or breach of or default in connection with any of the representations, warranties and covenants given or made by WAIS in this Agreement, the WAIS Schedules or any exhibit attached hereto or (b) any claim, demand, action, or cause of action brought within two (2) years after the Closing Date relating to any matter disclosed or required to be disclosed on Section 2.22 to the WAIS Schedules as required by Section 2.22.2(f) hereof (the "Section 2.22.2(f) Matters"); provided that the event underlying such claim, demand, action or cause of action occurred prior to the Closing Date. Notwithstanding anything in this Agreement to the contrary, (i) the Escrow Shares shall be AOL's and Sub's sole recourse for breaches of all representations, warranties, agreements and covenants made by WAIS and/or Mr. Kahle pursuant to this Agreement, other than the Specific Representations and the Section 2.22.2(f) Matters and (ii) the AOL Common Stock and ~~Additional AOL Options~~ issued ~~or granted~~ to Mr. Kahle, and any proceeds thereof, and the Escrow Shares shall be AOL's and Sub's sole recourse for breaches of the Specific Representations and for the Section 2.22.2(f) Matters. Notwithstanding the foregoing, (w) upon and after the Final Release Date, Mr. Kahle's obligation to indemnify AOL for any claim relating to the Section 2.22.2(f) Matters that is not based on intentional, knowing or willful (as such terms are construed under the relevant federal statutes applicable to such claims) action or inaction of WAIS and/or Mr. Kahle shall be limited to an amount not to exceed fifty percent (50%) of Three Hundred Forty-six Thousand Dollars (\$346,000), (x) Mr. Kahle's obligation to indemnify AOL with respect to any claim relating to Section 2.22.2(f) Matters shall be limited only to such claims arising under those Government Contracts entered into by WAIS

prior to the Closing Date, (y) AOL shall use commercially reasonable efforts to mitigate liability to WAIS and/or Mr. Kahle resulting from WAIS's failure before the Closing to properly legend WAIS's software upon delivery to the U.S. Government and (z) with respect to any TMC Claim that is not based on ~~intentional, knowing or willful action or inaction of willful infringement of Intellectual Property Rights by~~ WAIS and/or Mr. Kahle, AOL shall be responsible for the defense thereof (with the reasonable cooperation of WAIS and Mr. Kahle); provided that all legal fees and expenses in connection with such defense shall be included as Damages hereunder, and provided, further that AOL may not enter into any settlement of any TMC Claim indemnified by Mr. Kahle hereunder without the prior written consent of Mr. Kahle, such consent not to be unreasonably withheld or delayed. The indemnification provided for in this Section 10.2 shall not apply unless and until the aggregate Damages for which one or more Indemnified Persons seeks indemnification under this Section, exclusive of legal fees, exceeds \$25,000 (the "Basket"), in which event the indemnification shall include all Damages (including the Basket). AOL will use commercially reasonable efforts to obtain recoveries under all applicable insurance policies for all Damages.

## 11. MISCELLANEOUS

11.1 Governing Law. The internal laws of the State of California (irrespective of its choice of law principles) will govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto. Any litigation or other dispute resolution between the parties relating to this Agreement will take place in any court of competent jurisdiction.

11.2 Assignment; Binding Upon Successors and Assigns. Neither party hereto may assign any of its rights or obligations hereunder without the prior written consent of the other party hereto. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

11.3 Severability. If any provision of this Agreement, or the application thereof, is for any reason held to any extent to be invalid or unenforceable, the remainder of this Agreement and application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto.

11.4 Counterparts. This Agreement may be executed in any number of counterparts, each of which will be an original as regards any party whose signature appears thereon and all of which together will constitute one and the same instrument. This Agreement will become binding when one or more counterparts hereof, individually or taken together, will bear the signatures of both parties reflected hereon as signatories. Facsimile copies of such counterparts are acceptable.

11.5 Other Remedies. Except as otherwise provided herein, any and all remedies herein expressly conferred upon a party will be deemed cumulative with and not exclusive of any other remedy conferred hereby or by law on such party, and the exercise of any one remedy will not preclude the exercise of any other.